

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SEATTLE UNIVERSITY,

Employer,

and

SEIU LOCAL 925,

Petitioner.

CASE 19-RC-122863

SEIU LOCAL 925's  
STATEMENT IN OPPOSITION  
TO REQUEST FOR REVIEW

SEIU Local 925 opposes the request for review filed by the Employer, Seattle University (SU or the University). The University requests review of the Regional Director's Supplemental Decision and Order of March 3, 2015. In that Supplemental Decision and Order, the Regional Director, *inter alia*, ruled that the existing record is sufficient for deciding the issues and concluded that the Board may properly assert jurisdiction over Seattle University. SU requests review of these two rulings.<sup>1</sup> Contrary to the University's assertions, the extensive record in this case is more than adequate to decide the issues raised in the request for review; the Board's decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014) (herein sometimes referred to as *PLU*) thoughtfully and carefully sets forth the appropriate analysis of the jurisdiction issue; and the Regional Director correctly applied the jurisdiction standard to the facts of this case. The

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<sup>1</sup> The Regional Director's other rulings, concerning managerial status and community of interest determinations, are not the subject of the University's request for review and are not addressed here.

University's request for review does not establish a basis for review and, under Section 102.67(c) of the Board's Rules and Regulations, the Board should deny the request for review and affirm the Regional Director's Supplemental Decision and Order.

## **I. Background**

In *Pacific Lutheran University, supra*, the Board reexamined Board and court precedent under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) with respect to the exercise of jurisdiction over self-identified religious colleges and universities. The Board articulated a new two-part test to be used in place of its former "substantial religious character" test. This *PLU* test avoids intrusive inquiry into a university's religious beliefs and protects employee rights under federal labor policy. The Board enunciated the two-part test as follows:

[w]e will not decline to exercise jurisdiction over faculty members at a college or university that claims to be a religious institution unless it first demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment. Once that threshold is met, the college or university must then show that it holds out the petitioned-for faculty themselves as performing a specific role in creating or maintaining the college or university's religious educational environment.

*Pacific Lutheran University*, 361 NLRB slip op. at 6.

Following the issuance of the *PLU* decision, the Board remanded this case to the Regional Director.<sup>2</sup> The Regional Director issued an order directing the parties to submit position statements on the question of whether the current record is adequate to address the issues under revised standards announced in *PLU*. On February 17, 2015, the parties filed position statements. As set forth above, in his Supplemental Decision and Order, the Regional Director decided that the record is sufficient and concluded that the Board has jurisdiction over Seattle University.

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<sup>2</sup> The Board's February 3, 2015, order remanded this case to the Regional Director "for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary."

## **II. The Regional Director Correctly Ruled that the Record is Sufficient to Decide the Issues.**

Seattle University's request for review asserts that due process requires that SU be given an opportunity to present additional, although vaguely-defined, evidence. The University describes this evidence with no more specificity than "testimony from faculty and others regarding the religious function faculty members serve under the University's religious mission, as well as evidence regarding the Jesuit faculty and faculty of the School of Theology and Ministry." Request for review at p 23.

As set forth above, in *PLU* the Board announced a two-part test for the assertion of jurisdiction. The first, threshold part of the *PLU* test comes from the jurisdictional test proffered by the court of appeals in *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir 2009) and *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In the underlying hearing in this case, prior to the issuance of the decision in *PLU*, SU argued that the Board should adopt the court of appeals test set forth in *Carroll College* and *University of Great Falls*. The University does not contest that it was given a full and fair opportunity to litigate the jurisdiction issue under both the Board's previous substantial religious character test and its preferred D.C. Circuit test. In his Supplemental Decision and Order, and on the basis of the existing record, the Regional Director found that SU meets the first part of the *PLU* test in that it holds itself out as providing a religious educational environment. The University does not challenge the Regional Director's findings in that regard.

The University does request review of the Regional Director's finding that it does not meet the second part of the *PLU* test, *i.e.*, it does not hold out its faculty as performing a specific religious role. As the *PLU* decision makes clear, with respect to this second part of the *PLU* test, federal courts, including the Supreme Court, have long recognized "religious function" as the central focus of the jurisdiction question. *See, e.g.*, cases cited in *Pacific Lutheran University*,

361 NLRB slip op at 7-8, and fn 10, 11. A review of both the cases cited by the Board in *PLU* and the evidence the Board relied on in *PLU* to decide the jurisdiction question demonstrates that the Board did not broaden the analysis of the jurisdiction issue, but narrowed it; the Board did not create new areas of relevant evidence, but determined that, to address certain criticisms of its substantial religious character test, it would no longer focus on the entirety of evidence relevant to a substantial religious character finding.<sup>3</sup> In *PLU* the Board announced that it would focus on evidence that has always been relevant both to the substantial religious character test *and* to the D.C. Circuit test: the faculty role in providing a religious educational environment, specifically representations made by a university about the faculty role in any asserted religious mission and the effect of a university's religious environment on specific faculty job duties and responsibilities.

At the hearing in this case the parties had, and availed themselves of, a full and fair opportunity to present that evidence. Thus, the evidence in the record includes job descriptions, job postings, employment contracts, faculty handbooks, statements to accrediting bodies, representations made on the university's website, and statements to prospective and current faculty and students. The evidence also includes handbooks, mission statements, corporate documents, course catalogs, press releases or other public statements by university officials, and the University's contemporary presentation of itself to prospective students, faculty, and the public. All of this evidence is relevant to whether the University represents to current and potential students and faculty members and to members of the community at large that the religious nature of the University affects faculty members' job duties or requirements. In addition, SU has already presented the evidence it now describes in its due process argument, *i.e.* evidence "regarding the religious function faculty members serve under the University's

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<sup>3</sup> As the University itself acknowledges in its request for review, quoting from *St Joseph's College*, 282 NLRB 65 (1986), under the substantial religious character test the Board "scrutinized 'all aspects of a religious school's organization and function.'"

religious mission, as well as evidence regarding the Jesuit faculty and faculty of the School of Theology and Ministry.” To the extent, if any, that there exists more evidence in this regard, SU is not entitled to an additional opportunity to present it, and SU has neither identified potential additional evidence with specificity nor made an attempt at an offer of proof.

The three cases cited by Seattle University in support of its due process argument are all inapposite. The cited Sixth Circuit case [*Welch v. Commissioner of Internal Revenue*, 208 F.3d 213 (6<sup>th</sup> Cir. 2000)] is particularly inappropriate in that it is an unpublished Sixth Circuit decision which, by court rule, is of limited authority. In that case, the Sixth Circuit remanded a case to the tax court on an issue that had not been determined by the tax court prior to the appeal. Clearly in this case the University is asking for an opportunity to present evidence on an issue that was fully litigated at the hearing: whether the Board has jurisdiction over Seattle University under *Catholic Bishop*. In the second case cited by SU, *Community Transit Services, Inc.*, 290 NLRB 1167 (1988), a regional director exercised discretion in reopening a record after the Board added a new category of evidence relevant to determining whether the Board will assert jurisdiction over an employer with close ties to an exempt government entity. At the hearing in that case, prior to the appeal and remand, the regional director had received evidence on whether the employer retained sufficient control over employment conditions to enable it to engage in meaningful bargaining. The new standard, developed by the Board after that hearing, added an additional area of examination: the scope and degree of control over employment conditions exercised by the exempt entity. As set forth above, unlike in *Community Transit Services*, the Board in *PLU* did not add a new area of examination, but instead narrowed the focus to examination of a part of the evidence relevant to the previous standard. The third case cited by Seattle University, *Factor Sales, Inc.*, 347 NLRB 747 (2006), similarly does not support the University’s due process argument. In *Factor Sales* the Board looked at whether an allegation in an election objection, which referred to certain statements made to “off-duty” employees, could

be the basis of findings that the employer engaged surveillance and in impermissible conduct toward employees who were “on the clock.” The facts elicited at the hearing did not, as required by Board law and procedure with respect to the processing of election objections, comport with the factual allegations in the objection itself. Seattle University is not an election objections case, and this is not a situation in which specific facts elicited at hearing are different than specific facts alleged. Rather, at the hearing in this case Seattle University raised the issue of jurisdiction itself and strenuously litigated that issue. The record is replete with evidence of the manner in which the University portrays the duties of its faculty vis-à-vis the University’s mission. SU was fully aware, or at a minimum should have been fully aware, that any evidence that its faculty were being held out as performing a specific religious function would be crucial to the determination of the jurisdiction issue.

Thus, SU was on notice at the time of the hearing that any evidence of either religious function or of representations of religious function was relevant to the issue of jurisdiction. SU cannot now legitimately use the Board’s decision in *Pacific Lutheran University* to gain another opportunity to present any evidence that it failed to offer at the hearing. Moreover, SU has made no effort to identify any specific new evidence that meets the clearly stated requirements described by the Board in the *PLU* decision. Nor has SU made any effort to identify any specific evidence in its request for review that contradicts the extensive record evidence that faculty *do not* have a specific religious function.

Just as the record in the *PLU* case was adequate to decide the jurisdiction issue in that case, the record in this case is more than adequate to decide the issues under the Board’s rulings in the *PLU* decision. The Board should deny Seattle University’s request for review of the Regional Director’s decision not to reopen the record.

### **III. The Regional Director Correctly Asserted Jurisdiction over SU.**

#### **A. Seattle University Has Offered No Reason for Reconsideration of the *Pacific Lutheran University* Decision.**

In coming to its decision in *PLU*, the Board engaged in a lengthy and thorough process including issuance of a notice and invitation to the parties and the public to file briefs on issues raised, including those raised with respect to jurisdiction. The primary argument that Seattle University makes in its request for review is that the Board's decision in *Pacific Lutheran University* was wrongly decided and the Board should abandon that decision and fully adopt the test described by the court of appeals in *Carroll College* and *University of Great Falls*. Seattle University does not raise anything not already raised in the Board's lengthy process or not already carefully considered by the Board in issuing the *PLU* decision. Seattle University has offered no reason for the Board to revisit the *PLU* decision here.

#### **B. The Employer Has Offered No Legitimate Reason to Grant Review of the Regional Director's Exercise of Jurisdiction.**

The Regional Director faithfully and carefully followed the Board's *PLU* decision and correctly found that SU is not a church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). As set forth above, the University requests that the Board review the Regional Director's finding that SU does not meet the second part of the *PLU* test in that it does not hold out its faculty as performing a specific religious function. With respect to this religious function part of the jurisdiction analysis, the Board said in *PLU*, "[g]eneralized statements that faculty are expected to, for example, support the goals or mission of the university . . . do not communicate the message that the religious nature of the university affects faculty members' job duties or requirements." *Pacific Lutheran University*, 361 NLRB slip op at 8. Such statements, the Board said, even if they do exist, are not representations that

demonstrate that faculty members have a specific religious function such that the religious nature of the University has an impact on faculty members' employment. *Id.*

The Regional Director's finding that SU does not hold out its non-tenure track faculty as performing a religious function is based on the extensive record of communications, in documents and otherwise, to students, the faculty, and the public about the role and responsibilities of SU faculty. The record thus includes evidence that faculty members are subject to no religious requirements whatsoever and evidence that the University does not even inquire into the religious beliefs and values of its non-tenure track faculty or ask the non-tenure track faculty to respond to the University's mission, vision, or values. As the Regional Director's Supplemental Decision delineates, faculty job postings contain no suggestion that faculty have a specific religious function, and these documents affirmatively state that the University does not discriminate on the basis of religion. The University does not permit faculty interviews to include questions about religion or creed, and the evidence shows that interviews do not in fact include discussion of religion unless the prospective faculty member raises the subject. These communications represent to prospective faculty that, if hired, they will have no religious function. Once hired, faculty members' specific responsibilities are set forth in the faculty handbook. Those requirements, which are not religious, are that faculty must maintain competence as teachers and an understanding of their academic field. Similarly, faculty performance evaluations, primarily in the form of student evaluations, contain no references to religion. Although students, as part of their "core" curriculum, are required to take two religion courses, at least one of which must contain a component on Catholic tradition, the descriptions of that curriculum show the manner in which the University holds these courses out to students and



the public: they are academic courses, not opportunities for faculty members to proselytize or instill Catholicism, or any religion, in the students.

While SU's mission and vision statements refer to "empowering leaders for a just and humane world," to a commitment to "diversity, free speech, and academic freedom," and to providing a "formative and transformative liberal education," SU cannot establish that these generalized statements render religious any specific faculty role. The University's widely accessible materials, such as webpages and course catalogs, convey no message that faculty members have a specific religious function, but instead characterize the education that SU offers, through its faculty, in terms of secular values. SU conveys to its constituents that it is "explicitly and officially" autonomous from the Catholic Church. Er Ex 71. Even the University's accreditation documents – in which SU chooses to identify itself as an institution that "does not seek to instill a specific belief system or world view" – disavow any religious function on the part of its faculty. U Ex 4, p 80. These documents communicate, for example, that the University "operat[es] independent of the Catholic Church or Society of Jesus." U Ex 4 p 56.

In response to the Regional Director's findings, the University asks the Board to find that education is a religious endeavor and teaching is a religious vocation. The University asserts that because Jesuits believe that people have a religious dimension and because the University's mission is to educate the whole person of the student, its faculty must be found to be performing a specific religious function. As SU says in its request for review, it "expects that Catholic social teaching informs the faculty's thoughts and interests . . . and looks for faculty to incorporate Catholic social teaching as they deem appropriate in their coursework." Request for review at 18-19. SU asserts that these "expectations" (which are nowhere conveyed to the non-tenure track faculty or other constituents) demonstrate a religious function. The University sums up its

arguments in this way: “The religious function of the faculty is to teach at a Catholic and Jesuit university.” *Id.*

These and other similar assertions by the University in its request for review are exactly the kind of generalized statements that the Board in *Pacific Lutheran University* said will not establish that a university represents its faculty members as having a specific religious function such that the religious nature of the university has an impact on faculty members’ terms and conditions of employment. The definition of “religious function” for purposes of this proceeding is that which the Board has determined will identify First Amendment entanglements with the collective bargaining rights of non-tenure track faculty. In defining religious function, for purposes of the First Amendment and collective bargaining rights, the Board is governed by the direction of the Supreme Court in *Catholic Bishop* and by Board and court precedent interpreting that decision. In *Pacific Lutheran University*, the Board clearly defined the types of religious functions that may result in First Amendment entanglement with collective bargaining rights. Seattle University has not, and clearly cannot, establish that it has assigned to its non-tenure track faculty religious functions that meet the definition in that case. Nothing in Seattle University’s public communications conveys that its non-tenure track faculty members, simply by teaching, are performing a religious function. The natural right of workers to organize and the moral duty of employers to bargain collectively are not in any way at odds with the secular liberal education that SU students receive through the efforts and assigned responsibilities of SU’s non-tenure track faculty.

#### **IV. Conclusion.**

Seattle University’s request for review does not establish that the Regional Director departed from official Board precedent or that the decision is clearly erroneous on a substantial

factual issue, nor does it establish that there are compelling reasons in this case for reconsideration of Board rules or policies. Under Section 102.67(c) of the Board's Rules and Regulations, the Board should deny the Employer's request.

DATED this 24<sup>th</sup> day of March, 2015.

**DOUGLAS DRACHLER  
MCKEE & GILBROUGH LLP**

By\_\_\_\_/s/\_\_\_\_\_  
Martha Barron, WSBA #15100  
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## **CERTIFICATE OF SERVICE**

I certify that on the 24<sup>th</sup> day of March, 2015, I electronically filed with the NLRB via e-file the Union's Statement in Opposition to Request for Review of the Regional Director's Supplemental Decision and Order and served the document as follows:

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Dated this 24<sup>th</sup> day of March, 2015.

\_\_\_\_\_/s/\_\_\_\_\_  
Paul Drachler